

May 28, 2004

Mr. Joseph DuBray, Jr.  
Director, Division of Policy, Planning and Program Development  
Department of Labor  
Office of Federal Contract Compliance Programs  
Room C-3325  
200 Constitution Avenue, NW  
Washington, DC 20210

Re. Proposed amendment to 41 CFR Part 60-1

Dear Mr. DuBray:

ORC Worldwide (ORC) submits these comments on the proposed "Obligation To Solicit Race and Gender Data for Agency Enforcement Purposes" (Proposed Rule), which was proposed by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) which notice was published on March 29, 2004 in the *Federal Register* at 69 *Fed.Reg.* 16446-16450.

### **ORC Worldwide**

ORC Worldwide is an international management consulting firm specializing in human resources. Senior human resource executives and corporate labor and employment counsel from more than 200 *Fortune* 500 companies participate in networks and other activities sponsored by ORC in order to improve compliance and management systems and practices in the areas of equal employment opportunity, affirmative action and diversity, as well as labor and employment law. The following comments, however, are solely those of ORC and may differ from the views of individual participating companies.

### **General**

ORC supports OFCCP's efforts to amend "its recordkeeping requirements for compliance monitoring and other enforcement purposes to conform to the new interpretive guidance promulgated by the UGESP agencies". ORC also appreciates the efforts of the Equal Opportunity Commission (EEOC), OFCCP, Department of Justice, and the Office of Personnel Management (OPM) for their efforts to address the "issue of how use of the Internet by employers to fill jobs affects employer recordkeeping obligations" (68 *Fed.Reg.* 10153) and to "evaluate the need for changes to the questions and answers accompanying the Uniform Guidelines necessitated by the growth of the Internet as a job search mechanism" (68 *Fed.Reg.* 10153), which notice was published on March 4, 2004 in the *Federal Register* at 69 *Fed.Reg.* 10152-10158. ORC submitted formal comments to the proposed Interpretive Guidance on May 3, 2004, and copy of those comments are enclosed and incorporated by reference.

Most of ORC's members are federal contractors and will be required to comply with the requirements set forth in both the OFCCP's Proposed Rule, as well as the Interpretive Guidance. They will also be required to comply with the existing Uniform Guidelines on Employee Selection Procedures (UGESP), which have not changed as a result of the Interpretive Guidance. Since all three set forth recordkeeping requirements that will

directly impact nearly every ORC member, ORC's comments will also address the proposed Interpretive Guidance and existing UGESP as appropriate in this letter.

## **Overview**

There were several positive aspects incorporated into the Proposed Rule, for which ORC is most appreciative. Specifically, the Proposed Rule explicitly recognizes the concept of "basic qualifications" as one of the criteria for defining an Internet Applicant. However, the Proposed Rule also raises a number of issues that are problematic for contractors, including the differing standards between the OFCCP's Proposed Rule and the EEOC's proposed Interpretive Guidance on what constitutes an "Internet Applicant." This complexity is made worse by yet a third standard under existing UGDESP for non-Internet applicants. The Proposed Rule also raises significant new recordkeeping burdens. The following comments will address these issues in greater detail below.

### ***1. The OFCCP and EEOC should have a common definition of an "Internet Applicant".***

ORC strongly recommends there be one single definition of an Internet Applicant between the OFCCP and the EEOC. If implemented in their current forms, the OFCCP's Proposed Rule and the EEOC's Interpretive Guidance sets forth two widely divergent standards for what constitutes an Internet Applicant. Enclosure 1 summarizes what constitutes an applicant under the OFCCP's Proposed Rule, EEOC's proposed Interpretive Guidance, and under the existing UGESP, and there are important differences between these definitions as they currently stand. Employers who are federal contractors will be required to comply with these different requirements for Internet Applicants, which will create substantial burdens on employers' systems, create organizational inefficiencies, and cause needless confusion when interfacing with the OFCCP and EEOC over compliance or enforcement issues involving essentially the same kind of records.

It states in the Summary of the Proposed Rule (69 *Fed. Reg.* 16446) that the Proposed Rule "would amend OFCCP recordkeeping requirements for OFCCP compliance monitoring and other enforcement purposes *to conform to the new interpretive guidance* promulgated by the UGESP agencies". (emphasis added). With such widely divergent standards for what constitutes an applicant, ORC questions whether, in fact, the OFCCP has achieved the conformity it sought.

- a. *Consistency with basic qualification requirements:* While supportive of OFCCP's inclusion of a "basic qualification" requirement in its definition of Internet Applicant, as outlined in more detail below, ORC believes it is important that the OFCCP and EEOC Interpretive Guidance be consistent with respect to such requirements. For example, while the EEOC proposed Interpretive Guidance certainly suggests in its Q&A #97 that a minimum qualification (e.g., two years printing experience in the example given) requirement is acceptable, it is by no means clear. Reconciliation of those two somewhat conflicting positions would be extremely helpful to employers in establishing their compliance applicant processes.
- b. *Consistency between "considers" and "acting to fill":* ORC generally supports the Proposed Rule Criteria No. 2 ["The employer considers the individual for employment in a particular open position"], especially because it is consistent with the EEOC's proposed Interpretive Guidance in Q&A No. 96, which states that one of the criteria to be an applicant is that the employer has acted to fill a particular position. However, ORC believes the term "considers" is somewhat ambiguous and needs further clarification and explanation. The range of activities that could be construed under "considers" is potentially very broad. ORC supports an interpretation that is more in line with the EEOC's proposed Interpretive Guidance of "acting to fill a particular position", but believes it should also mean determining whether the individual has met the basic qualifications for the position.

- c. *Consistency between “expression of interest” and “for a particular open position”*: ORC also has serious concerns about the Proposed Rule Criteria No. 1, which lists one of the criteria for an Internet Applicant being an individual who “submits an expression of interest in employment through the Internet or related electronic data technologies”. This requirement could create arguably a voluminous, unmanageable potential applicant pool that would not be meaningful because it does not limit the expressions of interest to a particular job. For example, if over 20,000 job seekers on Monster.com had two years printing experience and a contractor “considered” many of those job seekers by reviewing their resumes, under the OFCCP definition, they could be considered Internet Applicants even though they never expressed an interest in working for the contractor.

Consequently, ORC recommends that Criteria No. 1 be modified to state, “the job seeker has submitted an expression of interest in employment *for a particular open position* through the Internet...” This change would be consistent with criteria #3 of the EEOC’s proposed Interpretive Guidance, which states the individual has indicated an interest in the particular position. Alternatively, ORC could support a change that states the job seeker must express an interest in employment for a specific position with a particular employer.

Another point that needs clarification is what constitutes an “expression of interest” under this section. ORC recommends the language be revised for consistency with the EEOC’s proposed Interpretive Guidance, which requires the individual to have followed the employer’s standard operating procedures for submitting applications. This language is consistent with the original UGESP Q&A 15, which recognized that interest may be expressed by completing an application form, or might be expressed orally, depending upon the employer’s practice. Contractors have established policies and procedures outlining how job seekers should “express interest” in working for their company, which is acknowledged in the EEOC’s proposed Interpretive Guidance. For example, some contractors may want job seekers to complete an application form as part of their recruitment process, and ORC supports their position. Simply put, not every expression of interest should be considered an applicant until it has been considered against a specific position.

- d. *Consistent criteria for applicant definition*: The simplest approach to resolve these many discrepancies would be for each agency to agree to adopt common language in their final rule/interpretive guidance. Assuming the final approach addressed the concerns raised by ORC in its formal comment letters to the EEOC and OFCCP, such an approach would result in better employer processes and systems to ensure compliance.

## **2. *There should be a single standard for “Internet Applicants” and “Paper Applicants”.***

The Proposed Rule will create “differing standards for data collection for traditional applicants versus Internet Applicants for the same job.” (69 *Fed.Reg.* 16847). OFCCP is specifically soliciting comments on “whether this dual standard will provide OFCCP with meaningful contractor data to assess in determining whether to commit agency resources into an investigation of a contractor’s employment practices” (69 *Fed.Reg.* 16448). ORC strongly recommends that an applicant be defined in the same way regardless of whether the applicant has applied online (Internet Applicant) or by other more traditional means, e.g., in-person visit, hard copy submission via U.S. mail (Paper Applicant).

ORC makes this recommendation not only for purposes of the Proposed Rule, in which there would be differing standards for applicants for the same job, but also for Paper Applicants as exists under the existing UGESP. In addition to the complexity of having two different definitions of an Internet applicant between the EEOC and the OFCCP, all employers, regardless of their federal contractor status, must still comply with the existing UGESP. Notwithstanding the supplemental questions and answers issued in 1979 and 1980 (44 FR 11996, March 2, 1979 and 45 FR 29530, May 2, 1980) to

clarify and interpret the UGESP, there has continued to be a lack of common understanding and specificity in the definition of an applicant. This has resulted in years of unproductive efforts and debate between employers and in particular, the OFCCP, regarding how an applicant is defined, what records must be kept and when race and gender must be solicited.

While it is likely some employers have moved totally to electronic recruitment and selection, certainly many more companies use some kind of combination of electronic and paper procedures. Consequently, federal contractors will need to comply with three separate and distinct definitions: Proposed OFCCP Rule, proposed Interpretive Guidance, and the Existing Q&A No. 15, which was left unchanged in the proposed Interpretive Guidance and provides the definition of "paper applicants". This makes no sense and serves no reasonable purpose. It creates an unacceptable cumulative burden requiring employers to develop two or three different systems and internal requirements for the same recruitment and selection process. ORC also believes that such a dual standard will hinder production of meaningful contractor data to assess and determine whether to commit agency resources to an investigation of a contractor's employment practices.

ORC believes that OMB contemplated that it might be necessary to make changes to the existing questions and answers accompanying the UGESP when in 2000, it instructed the EEOC *"to evaluate the need for changes to the questions and answers accompanying the Uniform Guidelines necessitated by the growth of the Internet as a job search mechanism."*<sup>69</sup> Fed.Reg.10153) (emphasis added). Consequently, ORC has recommended to EEOC that it should change the existing questions and answers so there is one common definition of an applicant with no distinction between Internet Applicants and Paper Applicants.

With a common definition, employers would be able to increase the value of the information and reduce both costs and administrative burden by modifying or developing one system to capture and maintain records of race and gender for both Internet and Paper applicants. For example, a process could be set up whereby Paper Applicants are invited to self-identify and their submission could then be electronically scanned and stored in the same system used to capture and maintain self-identification of Internet Applicants. Implementation of a single definition and process would make compliance training and monitoring easier for managers and Human Resource specialists.

### **3. Incorporating the concept of "basic qualifications" is essential to a definition of an "Internet Applicant".**

Federal contractors have long supported the view that not everyone who submits a resume to a company should be considered an "applicant" for recordkeeping purposes. In other words, "a click does not an applicant make". With the advent of Internet technologies that permit thousands, if not tens and hundreds of thousands electronic resumes or their equivalent to be submitted to a single company, it is even more important than ever that contractors be able to screen out those individuals who clearly are not potential candidates for an opening. Consequently, ORC strongly supports this change and believes that companies, who understand their operational needs, should be accorded great deference to determine what are the basic qualifications to perform a particular position. Members have raised several important issues about various aspects of this requirement, and they include the following:

- a. *Qualifications must be objective:* Under proposed § 60-1.3 (1)(iv)(2)(ii), it states that, "One way to tell an advertised, basic qualification is objective is that a third-party, unfamiliar with the employer's operation, would be able to evaluate whether the job seeker possesses the qualification without more information about the employer's judgment." ORC believes the term "third-party" is ambiguous and needs to be clarified in order for contractors to better judge whether their qualifications meet this test. For example, what level of knowledge and familiarity in staffing, job qualifications, etc, is being contemplated here? Is the anticipated third-party an OFCCP compliance officer, a plaintiff's lawyer, an administrative assistant in the staffing department, a Human Resources person, the potential

applicant him or herself, etc.? Or is it contemplated that all of the individuals cited in the above example would reach the same conclusion?

- b. *Qualifications must be advertised:* Under proposed § 60-1.3 (1)(iii)(2), the employer must “advertise” the basic qualifications of the job. However, job seekers may submit expressions of interest to a company via the Internet or related electronic technologies that are not a direct response to an “advertisement”. Moreover, contractors may communicate the basic qualifications for a position or access job seekers in a manner other than through posting the necessary qualifications on the company Web site. ORC believes these job seekers should also meet the basic qualifications before being considered applicants. Consequently, ORC recommends this section be revised to require the individual possess the “advertised or *established*, basic qualifications”. This would mean that employers have already defined what the basic qualifications of a particular position, and those qualifications are noncomparative, objective, and job-related.

4. *Requirement to retain “any and all employment submissions” is burdensome.*

Section 60-1.12 (Record Retention) adds a proposed requirement for employers to retain “any and all employment submissions through the Internet or related electronic technologies, such as on-line resumes or resume databases (regardless of whether an individual qualifies as an Internet Applicant under 41 CRF 60-1.3) . . .” for a two-year period. The purpose for this requirement is so the OFCCP can evaluate whether the contractor has complied with the definition of Internet Applicant (Section II. Analysis, 69 *Fed. Reg.*16447).

It is difficult to overstate just how burdensome this requirement will be for many, if not most, contractors. There is a potential under this requirement for some of the largest companies to be required to store up to millions of expressions of interest over the retention period as some companies can receive up to 60,000 expressions of interest per month. Systems storage can be directly translated to increased costs. Quite simply, the more records that must be stored, the more costs companies will incur. ORC strongly recommends this requirement be reviewed closely and drastically limited.

5. *Comparisons based on “labor force statistics or other data” are not meaningful.*

In Section II (Analysis) (69 *Fed.Reg.*16447-16448), it states that OFCCP will rely on “labor force statistics or other relevant data for enforcing E.O. 11246 with respect to recruitment processes that occur prior to the collection of gender, race and ethnicity data”. It further states that “OFCCP will compare the proportion of women and minorities in the contractor’s relevant applicant pool with labor force statistics or other data on the percentage of women and minorities in the relevant labor force. If there is a *significant difference* between these figures, OFCCP will investigate further as to whether the contractor’s recruitment and hiring practices conform to E.O. 11246 standards.

Many employers have expressed concerns about this section. In general, employers are concerned that Census and workforce data are not necessarily reflective of current market conditions and consequently, it may not provide a valid snapshot of the currently available and viable applicant base. Federal contractors have carefully conducted analyses of their workforce as compared to available minority and female talent, considering representation of internal candidates, along with external occupational data from the U.S. Census to determine if representation in the company’s workforce, by employer-defined job groups, is below availability of skilled internal/external minority and female talent. The OFCCP’s reliance solely on data derived from the 2000 U.S. Census, which is now at least four years old, is not as reliable and accurate as a contractor’s own availability analysis. And since self-identification is voluntary, lack of demographics may create false positive when measured against Census data. Consequently, ORC recommends that this section be changed to make such an assessment of potential discrimination in

recruiting and hiring based on the contractor's own availability analysis. ORC also requests clarification on what the agency considers a "significant difference". ORC recommends that "significant difference" should mean two standard deviations.

**6. *The Proposed Rule will create a burden to employers.***

For the following reasons, ORC takes strong exception to the statement in Section III. (Regulatory Procedures) (69 *Fed.Reg.*16448): "If promulgated in final, this Proposed Rule would help clarify applicant recordkeeping requirements for Federal contractors in the context of the Internet and related technologies. Therefore, the Proposed Rule neither increases nor decreases burdens".

**a. *Proposed Rule is not the "silver bullet"***

As stated in formal comments to the EEOC with respect to its proposed Interpretive Guidance, the OFCCP's Proposed Rule, while providing some clarity around the agency's position on what is an applicant after several years of confusion, is not the "silver bullet". There are still some important areas that require additional clarification, particularly with respect to issues around "advertised, basic qualifications", record retention and storage issues, and the drastic inconsistencies between the various proposed and existing applicant definition rules.

**b. *Proposed Rule will impose a substantial systems storage burden on employers.***

Many employers are concerned about the enormous systems storage burden created by the Proposed Rule, particularly with the requirement to retain "any and all employment submissions through the Internet or related electronic technologies, such as on-line resumes or resume databases (regardless of whether an individual qualifies as an Internet Applicant under 41 CFR 60-1.3) . ." for a two-year period. A related issue is in what format must these records be maintained, particularly for those who were considered not considered applicants. The amount of storage space for these records could be quite substantial. In short, the Proposed Rule represents a substantial, but unacknowledged burden for employers, which should be considered prior to finalization of the guidance.

**c. *The estimate of burden to implement the Proposed Rule appears highly speculative.***

ORC believes the estimate of burden is highly speculative and substantially understates the actual burden on employers. The proposed burden estimate implicitly assumes that companies will simply "press a button" and the Human Resource Information Systems (HRIS) in large complex corporations, small or mid-size employers, or at third-party vendors will be able to automatically comply. This is simply not true. Moreover, the burden will increase substantially if employers are required to comply with three separate and distinct applicant definitions for which different records must be tracked and maintained. Costs to contractors will increase because the risk of liability for noncompliance is increased. Contractors who are required to comply with three differing standards run a greater risk of failure to comply because of the resultant organizational confusion and inefficiencies, and systems burdens that have been created. In short, contractors' attempts to comply with three different but somewhat overlapping rules will almost certainly result in more inadvertent failures to comply, and in the end, will require contractors to seek costly specialized technical and legal assistance to guide contractor compliance.

## Conclusion

ORC would like to thank the OFCCP for the opportunity to comment on this Proposed Rule. OFCCP has clearly made great efforts to respond to contractor concerns expressed over the years about the complexities of developing compliance systems around the murky definition of an applicant, and the agency is to be commended. However, as set forth above, ORC believes the OFCCP has several issues to address and resolve before this Proposed Rule can be properly finalized.

Sincerely,

A handwritten signature in black ink, reading "Patricia A. Schaeffer". The signature is written in a cursive style with a large, stylized "P" and "S".

Patricia A. Schaeffer  
Vice President  
ORC Worldwide

## Enclosure 1

Issue	Proposed Interpretive Guidance 69 Fed.Reg. 10152-10158 Q&A No. 96 (Summarized)	Proposed OFCCP Rule 69 Fed.Reg.16446-16450 § 60-1.3 (Summarized)	Uniform Guidelines on Employee Selection Procedures Q&A 15 (Summarized)
<b>Definition of an applicant</b>	<ol style="list-style-type: none"> <li>1. Employer has acted to fill a particular position;</li> <li>2. The individual has followed the employer's standard procedures for submitting applications; and</li> <li>3. The individual has indicated an interest in the particular position.</li> </ol>	<ol style="list-style-type: none"> <li>1. Job seeker has submitted an expression of interest in employment through the Internet or related electronic technologies;</li> <li>2. Employer considers the job seeker for employment in a particular open position</li> <li>3. Job seeker's expression of interest indicates the individual possesses the advertised, basic qualifications for the position;</li> <li>4. Job seeker does not indicate that he or she is no longer interested in employment in the position for which the employer has considered the individual</li> </ol>	<p>15.Q. What do the terms "applicant" and "candidate" mean as they are used in the Uniform Guidelines?</p> <ol style="list-style-type: none"> <li>1. Depends upon the user's recruitment and selection procedures;</li> <li>2. Person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities.</li> <li>3. Interest may be expressed by completing an application form, or might be expressed orally, depending upon the employer's practice.</li> </ol>

A. The precise definition of the term "applicant" depends upon the user's recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest may be expressed by completing an application form, or might be expressed orally, depending upon the employer's practice. The term "candidate" has been included to cover those situations where the initial step by the user involves consideration of current employees for promotion or training, or other employment opportunities, without inviting applications. The procedure by which persons are identified as candidates is itself a selection procedure under the Guidelines. A person who voluntarily withdraws formally or informally at any stage of the selection process is no longer an applicant or candidate for purposes of computing adverse impact. Employment standards imposed by the user which discourage disproportionately applicants of a race, sex or ethnic group may, however, require justification. Records should be kept for persons who were applicants or candidates at any stage of the process.